

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs February 3, 2009

STATE OF TENNESSEE v. EDWIN GOMEZ

Direct Appeal from the Criminal Court for Davidson County
No. 2001-A-280 Cheryl A. Blackburn, Judge

No. M2008-01163-CCA-R3-CD - September 29, 2009

The Defendant-Appellant, Edwin Gomez (“Gomez”) appeals from his resentencing pursuant to the remand order from the Tennessee Supreme Court in State v. Gomez, 239 S.W.3d 733 (Tenn. 2007) (“Gomez II”). He was convicted by a Davidson County jury of conspiracy to commit aggravated robbery, facilitation of felony murder, facilitation of especially aggravated robbery, and facilitation of aggravated robbery and was originally sentenced to six, twenty-five, twelve, and six years, respectively, in the Tennessee Department of Correction. The trial court ordered the sentences to be served consecutively for an effective forty-nine-year sentence. Following a remand and resentencing, the trial court imposed the same sentence. The sole issue presented for our review is whether the sentence imposed by the trial court is excessive. We affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as Right; Judgments of the Criminal Court Affirmed

CAMILLE R. McMULLEN, J., delivered the opinion of the court, in which JOHN EVERETT WILLIAMS and J.C. McLIN, JJ., joined.

Cynthia M. Fort, Nashville, Tennessee, for the defendant-appellant, Edwin Gomez.

Robert E. Cooper, Jr., Attorney General and Reporter; Melissa S. Roberge, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; Bret T. Gunn and Roger D. Moore, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Facts. The underlying facts of the case were outlined by the Tennessee Supreme Court in State v. Gomez, 163 S.W.3d 632 (Tenn. 2005) (“Gomez I”):

On March 16, 1999, Carlyle & Company Jewelers, (“Carlyle & Company”), a retail store located in the Green Hills Mall of Nashville, put on a special one-day “trunk” showing of approximately 100 Rolex watches with an estimated value of \$750,000. The sales event had been advertised throughout the Nashville area. The

next day, March 17, 1999, security guards Roy Rogers (“Rogers”) and Eugene Nagele (“Nagele”) arrived at the store shortly before 9:00 a.m. to retrieve and transport the watches to another store in the Nashville area for a similar event. For transport, the watches were stored in metal boxes, which were then stacked onto a luggage cart. Shortly after 9:00 a.m., Rogers and Nagele pushed the luggage cart from the store into the adjoining Green Hills Mall parking garage, where they had parked. Before they arrived at their vehicle, assailants attacked Rogers and Nagele from behind and stole the watches. Nagele testified that he heard the sound of footsteps “rushing” toward him, but before he could turn toward the assailants, he sustained a blow to the back of his head. Before losing consciousness, Nagele heard a gunshot. When he regained consciousness, Nagele heard someone calling for him. Realizing that Rogers had been shot, Nagele rushed to assist him. Twenty-one days later, Rogers died as a result of complications from a single gunshot wound.

Id. at 637. Gomez was convicted by a jury of four separate felonies. Based on several enhancement factors found by the trial court, Gomez received the maximum sentence for each conviction. This court and the Tennessee Supreme Court affirmed the convictions and sentences in State v. Gomez, No. M2002-01209-CCA-R3-CD, 2004 WL 305787, at *1 (Tenn. Crim. App., at Nashville, Feb. 18, 2004) and State v. Gomez, 163 S.W.3d 632 (Tenn. 2005) (“Gomez I”). However, the United States Supreme Court vacated those judgments in Gomez v. Tennessee, 549 U.S. 1190, 127 S. Ct. 1209 (2007) and remanded the case to the Tennessee Supreme Court to consider the sentences in light of Cunningham v. California, 549 U.S. 270, 293, 127 S. Ct. 856, 871 (2007). Upon consideration of Cunningham, the supreme court determined in State v. Gomez, 239 S.W.3d 733, 743 (Tenn. 2007) (“Gomez II”), that the enhancement factors relied upon by the trial court to impose the maximum sentence violated Gomez’s rights under the Sixth Amendment because they were not found by the jury beyond a reasonable doubt. The court then vacated the sentences and remanded the case to the trial court for resentencing. At the resentencing hearing, the trial court enhanced Gomez’s sentence based solely on his criminal history, imposed the maximum sentence within each of the applicable sentence ranges, and ordered the sentences to be served consecutively. Gomez then filed a timely appeal to this court.

Excessive Sentence. Gomez contends that his sentences were excessive because the trial court improperly “rel[ied] on three previous criminal convictions to reach the top of the range.” He further argues that the trial court erred in “giv[ing] such great weight to a foreign conviction for robbery in the third degree when there was no proof of how that grade might correlate in the Tennessee sentencing scheme.” In response, the State argues that “the trial court followed the Tennessee Criminal Sentencing Reform Act of 1989 and its finding that [Gomez] had three prior convictions was supported by the record and therefore it was entitled to place ‘great weight’ on [Gomez’s] prior convictions during sentencing.”

On appeal, we must review issues regarding the length and manner of service of a sentence de novo with a presumption that the trial court’s determinations are correct. T.C.A. § 40-35-401(d) (2006). Nevertheless, “the presumption of correctness which accompanies the trial court’s action

is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). Therefore, if the court fails to comply with the statutory requirements our review is de novo without the presumption of correctness. State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). The defendant, not the State, has the burden of showing the impropriety of the sentence. Sentencing Comm’n Comments, T.C.A. § 40-35-401(d) (2006). In the present case, the trial court carefully followed all the requirements of the Tennessee sentencing act and considered all the relevant facts when Gomez was sentenced. Therefore, we review this case de novo with a presumption of correctness.

When a trial court contemplates a sentence for a convicted criminal defendant, it must consider: (1) the evidence adduced at the trial and the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on the enhancement and mitigating factors set forth in Tennessee Code Annotated sections 40-35-113 and 40-35-114; (6) any statistical information provided by the Administrative Office of the Courts as to Tennessee sentencing practices for similar offenses; and (7) any statement the defendant wishes to make in the defendant’s own behalf about sentencing. See T.C.A. § 40-35-210(b) (2006); see also State v. Imfeld, 70 S.W.3d 698, 704 (Tenn. 2002); State v. Osborne, 251 S.W.3d 1, 24 (Tenn. Crim. App. 2007).

The pre-2005 sentencing act required the trial court to begin its determination of the appropriate sentence with a “presumptive sentence.” T.C.A. § 40-35-210(c) (Supp. 1998). For Class A felonies, the presumptive sentence was the midpoint of the appropriate range for the offense. Id. For Class B, C, D, and E felonies, this presumptive sentence was the minimum in the appropriate range for the offense. Id. After the trial court established the presumptive sentence, the court was required to enhance the sentence within the appropriate range based on the existence of any relevant enhancement factors and was required to decrease the sentence based on the existence of any relevant mitigating factors. Id. § 40-35-210(d), (e) (Supp. 1998). In the pre-2005 sentencing act, the trial court was granted discretion in determining the weight given to any enhancement or mitigating factor as long as the trial court followed the provisions of the Sentencing Act and supported its findings by the record. State v. Souder, 105 S.W.3d 602, 606 (Tenn. Crim. App. 2002). The only limitation on the trial court’s discretion was that the enhancement factors (1) must be “appropriate for the offense” and (2) not “essential elements of the offense.” See T.C.A. § 40-35-114 (1997). Facts supporting enhancement factors in the trial court need only be proven by a preponderance of the evidence. State v. Winfield, 23 S.W.3d 279, 283 (Tenn. 2000).

The record shows that Gomez elected to be sentenced under the pre-2005 sentencing law. As such, for each of his convictions Gomez was subject to the following sentencing range. Conspiracy is generally an offense one (1) classification lower than the most serious offense that is the object of the conspiracy. T.C.A. § 39-12-107(c) (1997). Aggravated robbery, the object of the conspiracy in this case, is a Class B felony, which is lowered to a Class C felony with a sentence range of not less than three (3) nor more than six (6) years. Id. § 40-35-112(a)(3) (1997). The

facilitation of the commission of a felony is an offense of the class next below the felony facilitated by the person so charged. Id. § 39-11-403(a) (1997). First degree murder is ordinarily considered one (1) class above a Class A felony; accordingly, facilitation of the offense is a Class A felony with a sentence range of not less than fifteen (15) nor more than twenty-five (25) years. Id. §§ 39-11-117(a)(1), 40-35-112(a)(1) (1997). The presumptive sentence for facilitation to commit first degree murder is twenty years. Id. § 40-35-210(c) (Supp. 1998). Facilitation of especially aggravated robbery, a Class B felony, has a sentence range of not less than eight (8) nor more than twelve (12) years. Id. § 40-35-112(a)(2) (1997). Facilitation of aggravated robbery, a Class C felony, has a sentence range of not less than three (3) nor more than six (6) years. Id. § 40-35-112(a)(3) (1997). The presumptive sentence for the conspiracy to commit aggravated robbery, the facilitation of especially aggravated robbery, and the facilitation of aggravated robbery offenses is the minimum sentence in the range. Id. § 40-35-210(c) (Supp. 1998). The trial court sentenced Gomez as Range I, standard offender, see id. § 40-35-105 (a), (b) (1997), and imposed the maximum sentence on each of the above offenses.

At the sentencing hearing, the presentence investigation report was admitted without objection as an exhibit. It contained, among other things, a description of Gomez's social and family history, his employment and education records, documentation of his mental and physical health, and some limited criminal history. The State offered three certified copies of out-state-convictions into evidence. However, because two judgments of conviction from New York did not bear Gomez's name, Belinda Shea, a latent fingerprint examiner with the Nashville Metropolitan Police Department testified. Shea obtained fingerprint cards for all of the out-of-state convictions, compared them to Gomez's fingerprints, and concluded that Gomez's fingerprints matched all three out-of-state convictions. Certified dispositions from New York for robbery in the third degree and "DUI" were admitted into evidence without objection. Gomez was sentenced to five years of probation and forty-five days, respectively. A certified copy of the aiding and abetting in theft from an interstate shipment judgment, a federal conviction from the Northern District of Texas, was also admitted into evidence without objection. Gomez was sentenced to twenty-eight months incarceration and ordered to pay \$500,000 in restitution for the federal offense. Gomez did not provide any proof.

Though not entirely clear from Gomez's brief, he apparently argues that his sentence was excessive because it was enhanced beyond the presumptive sentence based on out-of-state convictions. However, our review of the record shows that Gomez did not object to the authenticity of any of the three certified copies of convictions introduced into evidence or the testimony of the latent fingerprint examiner who matched the convictions to Gomez. On appeal, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record[.]" Tenn. R. Evid. 103(a). Our review of this issue is further complicated because Gomez failed to cite to any authority other than the standard of review and failed to provide any argument in support of this issue. "Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court." See Tenn. Ct. Crim. App. R. 10(b). Failure to comply with this basic rule will ordinarily constitute a waiver

of the issue. Id.; State v. Sanders, 842 S.W.2d 257, 259 (Tenn. Crim. App. 1992). Despite the procedural defects concerning this issue, we have reviewed the record and conclude that the trial court's enhancement of Gomez's sentence based on three out-of-state convictions was proper.

In regard to evidence offered at a sentencing hearing, "[t]he rules of evidence shall apply, except that reliable hearsay including, but not limited to, certified copies of convictions or document, may be admitted if the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted[.]" T.C.A. § 40-35-209(b) (2006); see also State v. Delbert G. Mosher, No. 01C01-9807-CC-00320, 1999 WL 820871, at *3 (Tenn. Crim. App., at Nashville, Oct. 13, 1999) (concluding that testimony by a probation officer who obtained information concerning the defendant's prior out-of-state conviction was sufficient proof of out-of-state convictions). Additionally, a "certified copy of the court record of any prior felony conviction, bearing the same name as that by which the defendant is charged in the primary offense, is prima facie evidence that the defendant named therein is the same as the defendant before the court, and is prima facie evidence of the facts set out therein." T.C.A. § 40-35-202(a) (2006). Gomez was given an opportunity to rebut the out-of-state convictions and declined to do so. Each of the out-of-state convictions were certified, and the latent fingerprint examiner confirmed their authenticity by examining Gomez's fingerprints. Finally, in so much as Gomez challenges the weight the trial court afforded to his criminal history, this court has previously held that this enhancement factor, alone, can be used to enhance a sentence to the maximum and firmly embed it in the ceiling. See State v. Samuel D. Braden, No. 01C01-9610-CC-00457, 1998 WL 85285, at *7 (Tenn. Crim. App., at Nashville, Feb. 18, 1998); State v. James Taylor, Jr., No. W2006-02085-CCA-R3-CD, 2007 WL 3391433, at *6 (Tenn. Crim. App., at Jackson, Nov. 14, 2007); State v. Barry Singleton, No. W2006-02476-CCA-R3-CD, 2009 WL 1161782, at *7 (Tenn. Crim. App., at Jackson, Apr. 29, 2009). Thus, we conclude that the trial court's reliance on the out-of-state convictions to enhance Gomez's sentence beyond the presumptive minimum was proper.

We note that the last two sentences of Gomez's brief "acknowledge this Honorable Court's current position regarding consecutive sentencing" but challenge this position as contrary to the holdings of Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348 (2000), and Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). Gomez's claim must fail.

First, as noted by the State, when the Tennessee Supreme Court vacated Gomez's sentences and remanded the case to the trial court for resentencing, it directed the trial court "to determine the full scope of [Gomez's] criminal histor[y] and to consider whether imposition of the maximum sentence on all convictions is appropriate." Gomez, 239 S.W.3d at 743. It further stated that, "[o]ur holding does not, however, affect the trial court's determinations regarding manner of service or the imposition of consecutive sentences." Id. We note "[i]t is a controlling principle that inferior courts must abide the orders, decrees and precedents of higher courts." Barger v. Brock, 535 S.W.2d 337, 341 (Tenn. 1976). Moreover, "[a]n order of the Tennessee Supreme Court remanding a case . . . for a limited purpose deprives this Court of authority to expand its review of the case." Weston v. State, No. E2001-01053-CCA-RM-PC, 2002 WL 1972458, at *6 (Tenn. Crim. App., at Knoxville, Aug.

27, 2002). Accordingly, we are precluded from reviewing this issue because it is beyond the scope of the supreme court's remand order.

In any event, after Gomez filed his brief in this matter, the Tennessee Supreme Court rejected this identical issue in State v. Allen, 259 S.W.3d 671 (Tenn. 2008). The court held that judicial findings of fact regarding whether a defendant is a dangerous offender whose crimes indicate little or no regard for human life or whether the terms imposed were reasonably related to the crimes committed are the “types of factors that assist a judge in determining the manner in which a defendant should serve sentences for multiple offenses; they are not the ‘functional equivalents’ of elements a jury considers in determining whether a defendant committed a greater or lesser crime.” Allen, 259 S.W.3d at 689. It concluded that “[a] trial court’s determination to impose consecutive sentences on the basis that a defendant is a dangerous offender does not, therefore, raise the Sixth Amendment concerns addressed in Jones, Apprendi, and Blakely.” Id. Accordingly, Gomez is not entitled to relief on this issue.

Conclusion. Based on the foregoing, the judgments of the trial court are affirmed.

CAMILLE R. McMULLEN, JUDGE